IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-656

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND UNITED AIRLINES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SHELDON M. CHARONE,
PLATO PAPPS,
SHERMAN CARMELL,
WILLIAM A. WIDMER, III,
STUART H. BRODY,
Attorneys for Petitioner.

Of Counsel:
CARMELL & CHARONE, LTD.,
39 South LaSalle Street,
Chicago, Illinois 60603.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner International Association of Machinists and Aerospace Workers, AFL-CIO, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on June 28, 1977, as supplemented by an order dated July 28, 1977, in case no. 76-1769.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit appears at 15 FEP Cases 310 and is appended at A. 1-19 *infra*. The order of the United States Court of Appeals for the Seventh Circuit supplementing the opinion was

entered July 28, 1977 and is appended at A. 20-21 *infra*. The decree of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on April 30, 1976 and the relevant portion thereof is appended at A. 22-25 *infra*. The order of the United States District Court for the Northern District of Illinois, Eastern Division, amending its decree, was entered on September 29, 1977 and is appended at A. 26-27 *infra*.

JURISDICTION.

The Court has jurisdiction under 28 USC § 1254(1). The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 28, 1977. A timely petition for rehearing was denied on July 28, 1977.

ISSUES.

1. Whether the court of appeals failed to comply with the Court's decision in *International Brotherhood of Teamsters* v. *United States*, ____ U. S. ____, 52 L. Ed. 2d 396 (1977) *(Teamsters)* by holding that despite the provisions of § 703(h) of Title VII of the Civil Rights Act of 1964, 42 USC § 2000e-2(h), a bona fide bargained-for classification seniority system, not tainted in its genesis or maintenance, may be changed to a company-wide seniority system because of the employer's pre-Act and post-Act discriminatory employment practices.
2. Whether the court of appeals failed to comply with the Court's decision in *Teamsters* by conclusively presuming that the present willingness of nonapplicants to change classifications bridges the "evidentiary gap" noted in *Teamsters* and relieves the Equal Employment Opportunity Commission of its burden of proof with respect to each non-applicant upon hearing before the district court.

3. Whether the court of appeals, by creating conclusive presumptions and fashioning remedies, usurped the function and authority of the district court to hold proceedings and make appropriate findings consistent with *Teamsters*.

STATUTE INVOLVED.

This case involves § 703(h) of Title VII of the Civil Rights Act of 1964, 42 USC § 2000e-2(h) (703(h)), which provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

STATEMENT OF THE CASE.

A. Proceedings Before the District Court.

On April 16, 1973, the United States of America filed a complaint in the United States District Court for the Northern District of Illinois, Eastern Division (the district court), pursuant to Section 707 of Title VII of the Civil Rights Act of

1964 (the Act), 42 USC § 2000e-6, against Respondent United Airlines, Inc. (UAL), Petitioner International Association of Machinists and Aerospace Workers (IAM),[1] and four other unions representing employees at UAL. On April 1, 1974, Respondent Equal Employment Opportunity Commission (EEOC) was substituted as plaintiff.

The complaint alleged that UAL had engaged in a pattern and practice of employment discrimination on the basis of race, sex and national origin, both before and after the passage of the Act, by utilizing improper testing standards and imposing unnecessary educational requirements on minorities. Also alleged was that UAL had discriminatorily assigned minorities and females to lower paying jobs and denied them promotional opportunities. The complaint sought injunctive relief and back pay.

The parties stipulated that UAL was solely responsible for the hire, transfer and promotion of employees. The only issue concerning IAM was "whether . . . the job classification seniority system established by collective bargaining agreements between [UAL] and the IAM perpetuates the effects of those discriminatory practices."[2]

The case proceeded to trial. At the close of the EEOC's case in late 1975, and upon suggestion of the district court, the parties engaged in settlement conferences. Agreement was reached on the implementation of employment goals, back pay

1. The employees represented under six separate IAM contracts have been historically certified by the National Mediation Board as separate "classes" or "crafts" under the provisions of the Railway Labor Act, 45 USC § 161 *et seq*. The agreements cover mechanics, ramp and stores, food services, guards, flight dispatchers, and Vancouver Agents. Of the 18,000 employees covered by the six agreements, 98.5% work under the mechanics, ramp and stores, and food services contracts.

2. (Final Pre-Trial Order, Exhibit D, Contested Issue No. 5.) The final pretrial order posed another contested issue of fact: whether the classification seniority system in the IAM contracts was established for the purpose of discriminating against Blacks and Spanish Surnamed Americans. As more fully explained at note 5 *infra*, the EEOC conceded that it was challenging only the seniority clauses' passive effect in perpetuating discrimination.

and retroactive seniority awards to individual victims of discrimination whose cases had been proved at trial. In addition, an "Implementation Committee" was created with authority to make further individual seniority adjustments on a case by case basis.

Changes in the structure of the seniority system were also discussed.[3] However, the seniority provisions of the decree—captioned as "Consent Decree"—presented to the district court by EEOC and UAL incorporated the term "company seniority" which the district court construed as enabling employees outside the IAM bargaining units to use non-IAM bargaining unit service for purposes of layoff protection upon transfer to IAM units.[4] Since the IAM would not agree to these changes in its seniority system, it alone refused to sign the consent decree. At a hearing on April 30, 1976, the district court found that IAM's classification seniority system was bona fide but rejected IAM's argument that the district court was without authority, based on the record, to unilaterally refashion the contracts' bargained-for seniority provisions.[5] The district court struck the word "con-

3. Seniority under the IAM contracts is equal to the time spent in specific job classifications and is used in layoff and recall as well as determining lead positions. Employees who transferred from one job classification originally lost their seniority and had to start over in the new classification. IAM had consistently proposed during negotiations that employees should retain job classification seniority so that in the event of layoff, they could return to a prior classification. Eventually UAL accepted a "fall back" period of two years which was incorporated into the collective bargaining agreements. By agreement of the parties, in the decree, the "restoration" principle was liberalized to allow fall back to prior classifications upon layoff irrespective of years outside the classification.

4. The decree, however, contained no reciprocal provision for awarding company seniority in this manner to IAM members who transferred to non-IAM positions.

5. EEOC, in its complaint, alleged only that IAM's seniority agreement perpetuated the effects of UAL's discrimination, not that its genesis or maintenance had any illegal purpose. Moreover, the EEOC, in its answers to IAM's interrogatories, its pretrial brief, and brief to the court of appeals, contended only that IAM's seniority perpetuated but did not purposely initiate or maintain discrimination. The court of appeals agreed (A. 15-16).

sent" from the title and entered the decree. No formal findings of fact or conclusions of law were issued. IAM appealed on the issue of whether a district court, after having made rightful place individual seniority adjustments for actual victims of discrimination, could, on this record, displace the bona fide bargained-for seniority. No other parties appealed.

B. Proceedings Before the Court of Appeals.

The court of appeals affirmed the district court. It rejected IAM's argument that the alteration of its bona fide seniority system impermissibly destroyed collectively bargained—for rights and was unnecessary once the victims of UAL's discrimination received their full compensatory seniority. After noting the *Teamsters* standard that seniority adjustments are made "only if the identifiable employees discriminated against can individually prove that they previously applied, sought to apply, or were dissuaded from applying for the positions in question and were qualified for the job at such time" (A. 9), the court of appeals said that it is "unfair" (A. 10) to require the employees to meet one of those criteria for relief, thereby justifying the "minor inroad" (A. 11) of discarding the collectively bargained seniority system.[6] Absent the "minor inroad" no relief would be obtained by individuals "who cannot prove the specific facts necessary for the limited adjusted seniority under the decree"[7] (A. 11).

> Company seniority is a common denominato. which treats all employees fairly *regardless* of past alleged discrimination (A. 18; emphasis added).

6. The "minor inroad" was the awarding of fictional competitive seniority to all UAL employees without regard to victimization, qualification, or prior application. Only the bargained for benefit seniority would be retained. Though stating that IAM's bargained for seniority was not the product of a discriminatory design (A. 15-16) the court below justified its inroad by citing cases where the seniority system had its genesis in racial discrimination (A. 11 n. 12).

7. The "limited adjusted seniority" was full compensatory seniority for any and all qualified employees who applied or sought to apply for a position but were discriminatorily denied it by UAL, or who could show they were dissuaded from applying by UAL's discriminatory practices.

After altering the seniority system, the court of appeals addressed the issue of non-applicants who will receive compensatory seniority. The court of appeals stated that:

> Unlike the situation in *Teamsters* the Government here need not "carry its burden of proof with respect to each specific individual." [Citation omitted.] This is because the 'evidentiary gap' for this group is filled by a given non-applicant's "current willingness to transfer into a . . . position [; it] confirms his past desire for the job."

(A. 13). The predicate for this rationale was that its award of fictional competitive seniority was limited to layoff and recall and was not awarded for such purposes as vacations, pensions, shift assignment or longevity pay.

Having altered the seniority system and awarded fictional seniority to all non-applicants, the court of appeals defined the nature of the relief it was fashioning as "either total tenure with the company after July 2, 1965 (the effective date of the Civil Rights Act of 1964) or total union seniority whichever is greater" (A. 16). This definition, it concluded, applies to all individuals employed by UAL except persons who chose not to transfer. Persons who chose not to transfer (regardless of whether they had been victims of discrimination) did not meet the court of appeals' evidentiary presumption.

> For them any seniority adjustment in their layoff and recall rights would be a remedy for the discriminatory effects passively engendered by the bona fide seniority system (A. 17).

Since the Court's decision in *Teamsters* issued after oral argument but before the court of appeals' decision, the EEOC and UAL, on June 20, 1977, filed a motion to remand the matter to the district court. This was denied in the court of appeals' opinion (A. 19 n. 19). Upon issuance of the opinion, IAM moved to vacate the opinion and remand the case to the district court. Alternatively, IAM requested a rehearing and suggested that it be *en banc*. The EEOC filed a motion for clarification. By order dated July 28, 1977 the court of appeals supplemented the "close of its opinion".

The supplement to the opinion begins by characterizing the Court's decision in *Teamsters* as "an extraordinary case from the standpoint of *stare decisis*."[8] In light of its perception of *Teamsters*, the court of appeals stated "the prior mistaken view of the law is more akin to a mistake of fact."[9] Consequently, the court of appeals held that the district court was free to fashion a new remedy consistent with *Teamsters* "generally" and the "gloss" placed on that decision by the court of appeals (A. 21). The petition for rehearing was denied. On August 9, 1977, the EEOC's motion for clarification was denied without comment.

C. Proceedings Before the District Court Upon the Decision of the Court of Appeals.

Owing to a planned layoff, UAL, joined by the EEOC, proposed to the district court an "Order Amending Decree" to resolve the manner of layoff. The order submitted on September 29, 1977 was opposed by IAM in a formal opposition filed on the same date. The district court signed the order without change or comment. This constituted the last action taken in this case prior to the filing of this petition.

REASONS FOR GRANTING THE WRIT.

The Decision Below Is a Direct Refusal to Adhere to the Court's Opinion in Teamsters.

The court of appeals refuses to comply with the Court's clear mandates in three separate but related areas of vital con-

8. The court of appeals' view as to what authority is binding on the Court is a novel one. The Court in *Teamsters* in fact specifically noted "The issues thus joined [regarding 703(h)] are open ones in this Court." 52 L. Ed. at 422, footnote omitted.

9. Since the court of appeals went to great lengths to justify judicial modification of a bona fide seniority system in its principal opinion, and in fact affirmed such modification, it is difficult to understand what is the mistake. If, as IAM believes, it was the rejection of the Court's holding regarding the immunizing effects of § 703(h), it is a confession of error fatal to its opinion.

cern in the administration of the Act. First, contrary to *International Brotherhood of Teamsters* v. *United States*, ... U. S. ....., 52 L. Ed. 2d 396 (1977) (*Teamsters*), the court of appeals, by fiat, altered the IAM seniority system despite the finding that the system was not tainted in its genesis or maintenance. Second, and again directly contrary to *Teamsters*, the court of appeals ruled that employees who had not formerly applied for transfers to an IAM bargaining unit, but who now express a willingness to so transfer, are conclusively presumed to have previously wished to do so. Finally, the court of appeals, by fashioning remedies absent findings of the district court, usurped the district court's primary function in direct contravention of *Teamsters*. Thus, the court of appeals has created an insurmountable barrier to the proper administration of an important federal law in the Seventh Circuit.

The court of appeals flatly contravened *Teamsters* by converting IAM's bona fide job classification seniority system to a company-wide seniority system. *Teamsters* held that § 703(h) immunized the "routine application" of a departmental seniority system, not tainted in its genesis or maintenance by discriminatory intent, even where the system tends to perpetuate the effects of employer pre- and post-Act discrimination. 52 L. Ed. 2d at 426. Victims of employer post-Act discrimination must be "made whole" within the structure of the existing seniority system, *Id.* at 422. "[Those] employees who suffered only pre-Act discrimination are not entitled to relief," *Id.* at 428.

The court of appeals rejected these holdings and selected two noncontractual standards for applying seniority: (1) to employees who have never worked in IAM bargaining units but now seek to transfer; and (2) to employees working in IAM bargaining units.[10] With respect to transferees from non-IAM

10. The court of appeals strongly criticized the IAM for withdrawing from a commitment to company seniority. Although the term company and plant seniority had been used in the settlement conferences, IAM perceived its meaning as it had been implied in every

(Footnote continued on next page.)

units, the court of appeals awards company seniority for layoff purposes to all employees who presently wish to transfer[11] (A. 17). With respect to employees in IAM units, the court of appeals creates a subspecies of company seniority called "union time" which combines all time spent in any IAM bargaining unit for purposes of layoff protection (A. 14, 16). In both these ways the court of appeals converts the IAM's bargained-for classification seniority into company seniority.[12]

The court of appeals further rejected an express holding of the Court by deciding that a non-applicant's current willingness to transfer creates a conclusive presumption of an unlawfully thwarted past desire for the job (A. 13, 17).[13] The

(Footnote continued from preceding page.)
judicial award of seniority relief. Thus, the "terminal" or "mill" or "plant" seniority referred to by the court in *Bing* v. *Roadway Express, Inc.*, 485 F. 2d 441 (5th Cir. 1973); *Local 189* v. *U. S.*, 416 F. 2d 980 (5th Cir. 1969), and *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E. D. Va. 1968), have meant total time within the contractually covered homogenous job classifications. It is within these units that progression through classification lines had been thwarted. IAM forcefully resists any implication that it was either intransigent at settlement conferences or that it violated any agreements or understandings reached informally in conference with the district court.

11. The improper basis on which the court of appeals justifies this award of "superseniority" is discussed at 11 *infra*.

12. The court of appeals appears to preclude the award of non-IAM time to pre-decree transferees to an IAM bargaining unit (A. 17, n. 17). The district court, however, when presented by UAL and the EEOC with a proposed "order amending decree" after the decision below simply ignored the footnote and signed the order without comment. The order merely rephrased its own decree taking no account of either *Teamsters* or the decision below.

13. The court of appeals distinguishes the Court's rejection of the presumption because, in *Teamsters*, the seniority involved was for benefit purposes in addition to lay-off and recall. This completely ignores the distinction between competitive seniority and benefit seniority drawn by the Court. 52 L. Ed. 2d at 420. It is little comfort to an individual who has been laid off as the result of a non-applicant's exercise of fictional seniority to know that if he were working he would be receiving the longevity pay which is unavailable to the employed non-applicant. The impropriety of this usurpation of the district court's function is discussed at 11-12 *infra*.

Court, in *Teamsters*, however, carefully prescribed the evidentiary showing by which individual victims of discrimination may obtain "make-whole" relief. The EEOC must carry "its burden of proof with respect to each specific individual at the remedial hearings to be conducted by the district court on remand" 52 L. Ed. 2d at 437. Non-applicants must prove that they would have applied for transfer but for discrimination and would have been discriminatorily rejected upon application. *Id.* at 436 n. 52.

Nevertheless the court of appeals decided that the Court mandated evidentiary process and the limitations on relief are inapplicable to employees presently wanting to transfer (A. 17). Accordingly, the court of appeals embraced the discredited equation of current willingness with past desire, eliminated the need for individual showings of proof, and voided the fact finding role of the district court.

Additionally, the court of appeals misunderstood the role assigned by the Court to the district court in the fashioning of relief under the Act; *i.e.*, the district court rather than the court of appeals first decides "which of the minority employees were actual victims of the company's discriminatory practices," 52 L. Ed. 2 at 438, and "adjust[s] the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing," *ibid.* By creating the conclusive presumption that present applicants are entitled to relief, and by awarding them company seniority rather than the bargained-for classification seniority, the court of appeals usurps the primary fact finding and remedial roles of the district court.[14] The court of appeals impermissibly distinguished the presumption it creates from that which the Court explicitly rejected in *Teamsters* (See note 13 *supra*). Assuming *arguendo* that such a distinction is

14. After *Teamsters*, the Court vacated and remanded nine courts of appeals decisions for further consideration in light of *Teamsters*, 53 L. Ed. 2d 267-268 (1977). In all seven instances in which further action has been taken by the courts of appeals to date, the cases have been remanded to the district court.

relevant, it is for the fact finder (the district court) to explicate the bases for such a distinction after a hearing.[15]

The court of appeals' denial of evidentiary hearings to elicit crucial facts upon which to fashion relief, "makes this case . . . important for the issues it raises as to proper allocation of functions between the district court and the courts of appeals within the federal judicial system". *Dayton Board of Education* v. *Brinkman,* ..... U. S. ....., 53 L. Ed. 2d 851, 857 (1977). In *Dayton,* as here, "the disparity between the evidence of [statutory] violations and the sweeping remedy finally decreed requires supplementation of the record and additional findings addressed specifically to the scope of the remedy." *Id.* at 863.

The decision below creates separate law in the Seventh Circuit and repudiates the final and supervisory authority of the Court. Despite *Teamsters,* the court of appeals accepted the "invitation to disembowel § 703(h)" specifically declined by the Court, 52 L. Ed. 2d at 426. Moreover, the decision may induce other courts to apply the court of appeals' statutory interpretation which even the EEOC concedes is incorrect.[16]

15. In *Hazelwood School District, et al.* v. *United States,* ..... U. S. ....., 53 L. Ed. 2d 768 (1977), the Court rejected the statistical framework (the appropriate labor market) selected by the court of appeals for determining a prima facie case of discrimination where fact hearings had not afforded the employer an opportunity to refute or suggest interpretations of the statistics. Determining the significance of an employee's current willingness to transfer without factual underpinings is no more accessible to a reviewing court than the relevant labor market in which statistics are to be interpreted.

16. Upon the issuance of *Teamsters,* the EEOC general counsel rendered a preliminary analysis of the decision in full accord with the contentions of this petition:

> The most important, and most damaging aspect of the decision [Teamsters] is its holding that Section 703(h) of Title VII protects, and thus prevents the upsetting of, seniority systems (even departmental seniority systems) solely because such seniority systems have the effect of perpetuating pre-Act discrimination by which minorities were assigned to and locked into low paying undesirable jobs. . . . [A person] who had previously

(Footnote continued on next page.)

Finally, the court of appeals, contrary to the rulings of the Court, usurped the hearing functions delegated to the district court and eliminated any burden of proof regarding past desire to transfer.

The administration of the federal judicial system impels the conclusion that, as was done in other cases, the decision of the court of appeals should be reversed and remanded to the district court for further proceedings consistent with *Teamsters.*

CONCLUSION.

For the reasons stated, IAM respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

SHELDON M. CHARONE,
PLATO PAPPS,
SHERMAN CARMELL,
WILLIAM A. WIDMER, III,
STUART H. BRODY,
Attorneys for Petitioner.

Of Counsel:
CARMELL & CHARONE, LTD.,
39 South LaSalle Street,
Chicago, Illinois 60603.

(Footnote continued from preceding page.)

> been misassigned cannot offer, as a legally recognizable reason for his post-Act failure to apply for a better position, the mere fact that he would have to go to the bottom of the seniority list in his new job. Preliminary Analysis by EEOC to General Counsel Abner W. Sibal from Joseph T. Eddins, Associate General Counsel. *Daily Labor Report* (BNA), No. 113, p. D-5, June 10, 1977.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit.

No. 76-1769
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,
Plaintiff-Appellee,

vs.

UNITED AIR LINES, INC., et al.,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 73 C 972—HUBERT L. WILL, *Judge.*

Argued January 13, 1977—Decided June 28, 1977

Before CUMMINGS, PELL and BAUER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In 1973, the United States, through the Attorney General,[1] filed a complaint under Section 707 of Title VII of the Civil Rights Act of 1964, as amended (42 U. S. C. § 2000e-6 (Supp. V 1975)), against United Air Lines, Inc. (United), the International Association of Machinists (IAM), and four other labor unions having collective bargaining agreements with United. As amended in 1974, the complaint alleged that United violated Title VII by discriminating against

1. Pursuant to Section 707(c) and (d) of Title VII (42 U. S. C. § 2000e-6(c) and (d) (Supp. V 1975), the Equal Employment Opportunity Commission (EEOC) was substituted for the United States as plaintiff on April 1, 1974.

minorities[2] and women in hiring and recruitment practices, assigning them to less desirable jobs, failing to promote them on the same basis as white male employees, and requiring employees to pass certain non job-related tests that contributed to the exclusion of a disproportionate number of minorities. The complaint also alleged that the collective bargaining agreements between the unions and United "contain provisions, including provisions for promotion, demotion, transfer and layoff based on job seniority, which discriminate against represented employees on the basis of race, national origin, and sex." These provisions in the IAM agreement assertedly required minorities and women to forfeit their accumulated seniority upon transfer to higher-paying IAM positions from which they had formerly been excluded. The Government sought injunctive relief and back pay.

On September 16, 1975, at the close of plaintiff's case, the district court orally denied the defendant's motion to dismiss except as to discrimination against Asian-Americans. In so ruling, the court stated that it disagreed with United's contention that a *prima facie* case could not be made out by the Government by using evidence with respect to statistical disparities between the mix of United's work force for various job classifications in the ten largest cities served by United and by using United States census statistics for those cities. Judge Will pointed out that in "large part, this is not true on all counts, stewardesses or flight attendants are apparently hired on a broader base, but generally speaking, I think you look at the area in which the hiring takes place, for a *prima facie* case, with respect to statistical demonstration of discrimination." The court also discounted United's suggestion that its job applications figures should be used because, as the EEOC had pointed out, lack of applications may "simply be an indicia of the effectiveness" of discriminatory

2. The minorities were defined in the complaint as blacks, Spanish-surnamed Americans and Asian-Americans. The defendants' motion to dismiss as to discrimination against Asian-Americans was subsequently granted at the close of the Government's case at trial for lack of evidence; that ruling is not involved in this appeal.

practices. The judge remarked that the Government had submitted evidence in addition to statistics in attempting to make a *prima facie* case of discrimination against blacks, Spanish-surnamed Americans and women, but that a *prima facie* case had not been made with respect to Asian-Americans. Viewing the evidence most favorably to the Government, as required on defendants' motion to dismiss, he concluded that the EEOC had made a *prima facie* case as to women and minorities. He found that the discriminations had occurred "pursuant to and consistent with * * * IAM contracts," so that defendant IAM was as much involved as United. In closing, he added that "IAM has at least gone along * * * if not proposed or promoted the idea" of the discriminations but that he would have "to wait and see all the evidence before [the Court] can have an opinion as to whether the IAM has participated in discrimination." (Tr. of Sept. 16, 1975.)

The district judge subsequently suggested that the parties seriously attempt to negotiate a settlement under close court supervision. Many conferences among counsel for United and the Government ensued.[3] On January 20, 1976, at an extensive in-chambers conference, all parties were represented when a draft consent decree was presented to the court. IAM objected to proposed changes in seniority provisions with respect to IAM jobs. Negotiations were resumed to resolve the IAM objections and an additional court conference took place on March 10. On April 13, 1976, a revised consent decree was presented to the court below. At the conference with the court, IAM presented an objection only to paragraph 2 of Section VII, which is not involved in this appeal. Since the district judge considered the IAM objection dropped by the end of the conference, April 30 was set for the entry of the consent decree. On that day, for the first time, counsel for IAM insisted that IAM seniority[4] be sub-

3. Attorneys for IAM were informed of the dates and progress of the negotiations but chose not to participate at that time.

4. That is time spent in any IAM job but excluding any time spent in a non-IAM job.

stituted for company-wide seniority in Paragraph 1 of Section VII of the decree. The basis for this objection was that it had "always been IAM's view, based on the fact that all of the Government's evidence related to employees who transferred from one IAM job to another, that the term 'company seniority' referred only to the total time employed by [United] in a job in one of the bargaining units represented by IAM. To make sure that our understanding was the same as [United's], a meeting was scheduled for April 26, 1976, during which [United] stated that their interpretation was that 'company seniority' meant total time employed by [United] irrespective of whether an employee worked in a unit represented by IAM. This raised a crucial question since IAM could not enter into a consent decree on that basis * * *." (Opposition of IAM to Proposed Decree at 2.)[5]

Paragraph 1 of Section VII of the decree provides as follows:

"VII. SENIORITY[6]

1. All job classifications covered by the United-IAM Ramp and Stores, Food Services, Mechanic, Dispatchers and Guards Agreements, as well as those jobs covered by United's agreemnts with TWU and ALPA, shall henceforth be governed by company seniority for purposes of determining priorities in layoffs and recalls. Employees in promoted positions holding seniority under the Mechanic, Ramp and Stores, Food Services, Dispatcher and Guard Agreements or thereafter promoted to such positions shall, upon return to a position under one of the Agreements in which he holds seniority, be credited for the purposes of layoffs and recalls with a company seniority date equivalent to the seniority they held while in the promoted position pursuant to the seniority provisions of the collective bargaining agreements."

Judge Will responded as follows after the IAM presented its objection to the use of company seniority in the foregoing portion of the decree:

"I talked about company seniority because it seemed to me that United, rightly, ought to recognize length of service as a consideration in layoff and that it was outrageous to take somebody who had been with them for 25 years, and because they had moved from one position to another within the last two, three, four years, say you're junior to somebody who has been with us four years, or five years, whatever it is, and therefore you get laid off notwithstanding your 25 years of service, and I don't care whether you are a union member or non-union member. It seems to me the whole concept of recognition of length of service as

5. IAM filed an "Opposition of IAM to Proposed Decree" dated April 29, 1976, on April 30, 1976. Judge Will was quite explicit in detailing his displeasure at this apparent *deus ex machina* objection:

"I am astonished because we have talked from day one about company-wide seniority, and not until this morning have I ever heard a suggestion of IAM seniority. Not once. Not once from the first day we talked about—and, I should tell you, if anybody had said to me on the first day that we want seniority within the ALPA members, or we want seniority within the IAM members, I would have said, who do you think you are. God's chosen people? What is the idea of coming in here and saying to me you are going to be entitled to discriminate against blacks if they don't happen to be IAM members, or ALPA members.

* * * * *

"You can appeal, if you like, and I can't stop you, but for you to tell the Court of Appeals that you were surprised, if you tell them that, it will be a falsehood. Nobody could be surprised about this subject. It was discussed and discussed, and discussed, and I was the one who started talking about company-wide seniority." (April 30, 1976, Tr. 5, 10.)

6. In general, Section VII of the decree was aimed at three separate goals: 1) encouraging transfers to higher-paying IAM positions by removal of the loss of seniority deterrent; 2) protecting minorities and females from layoff who had entered at low job levels and then moved up to higher job classifications because they were discriminatorily excluded from the higher positions in the past; and 3) adjusting the job classification seniority for all purposes of present ramp servicemen, storekeepers or mechanics who could individually prove being held back by a test result, educational requirement or other specific evidence of job discrimination.

a factor in layoff, makes it inescapable it is not going to be union seniority, whatever the union may be, or unorganized employee seniority. That it is going to be what we have talked about, all along, company seniority.

* * * * *

"What we were going to correct was the inequities resulting from a historic pattern of alleged discrimination in job assignment, and promotion, and hiring. We were going to correct that by giving company-wide seniority so that seniority in grade was not going to be the criterion in terms of layoff, but seniority, company-wide, would be a factor at least to be taken into consideration in layoff.

* * * * *

"The whole theory of the company-wide seniority was there was company-wide discrimination; therefore, in order to redress that, you had to get company-wide seniority. So that the fact that you were a black, and didn't get moved from the counter to something else, didn't prohibit you from staying on the job when, as, and if there was a layoff because some white who was there originally was hired for a higher job, or was promoted earlier, had longer seniority in grade, in job.

"The whole proof in the case was that at various levels, union and non-union, blacks had been deterred in job assignments and job promotion, and therefore, you had to do something, even though they had worked for United for a long period of time, you had to do something to give them some standing based on overall tenure, or service, and not just service in grade.

* * * * *

We are talking about company-wide seniority because that is the only way to deal with previous discriminations, whether or not they are within the IAM unit, or whether or not they were out of the IAM unit. That is the only reason we are talking about that." (April 30, 1976, Tr. 10-11, 13, 16-17, 24.)

At the close of the April 30 hearing, the district court entered the decree but in view of IAM's objection crossed out the word

"CONSENT" on the first page.[7] Jurisdiction was retained for the purpose of modifications.

IAM's main protest against paragraph 1 of Section VII of the decree is that it destroys IAM seniority and permits company seniority to be used in determining priorities in layoffs and recalls. IAM contends that IAM "job classification security" should have continued. It urges that the decree should provide "for the continual use of IAM job classification seniority for all purposes except for seniority adjustments to place employees in their rightful place and [except] for restoration of seniority to permit employees to avoid layoffs by returning to jobs previously worked" (Br. 35). We disagree and therefore affirm.

IAM represents the largest number of United's unionized employees. As of May 31, 1973, it represented 18,382 United employees, including 7,400 mechanics, 3,600 ramp servicemen, 790 storekeepers, 1,200 food service assistants and 1,300 airplane cleaners. Under IAM contracts with United, seniority was measured from the date of entry into a given job classification rather than time served with United. Thus employees who transferred from one IAM basic job classification to another originally lost their seniority for all purposes except vacation. Sometime later they were permitted to maintain seniority in their former positions until a 90-day probation period was completed in their new jobs. This period was extended to one year in 1970 and to two years in 1973. Moreover, non-union employees transferring to an IAM job would retain no seniority. However, employees who transferred between non-union positions retained their company seniority for purposes of layoff

7. IAM did not ask for an opportunity to resume trial or in any other way to produce evidence to rebut the Government's *prima facie* case to support its objection to the decree (Tr. April 30, 1976). Therefore, Judge Will's decision with respect to the Union was an adjudicated decision on the merits and not a mere consent decree. However, the decision remains a consent decree vis-à-vis United.

and recall. IAM seniority governs layoff, recall and shift assignments as to IAM jobs as well as access to premium jobs within a given basic job classification.[8] At least five minority witnesses testified that they were unwilling to risk transferring to high-paying IAM position unless they could retain their seniority.[9] Therefore, if IAM's contention as to using IAM job classification seniority in paragraph 1 of Section VII of the degree were sustained, minorities and females in non-union jobs and lower-paying IAM jobs would be deterred from transferring into higher-paying IAM jobs and would also be more susceptible to layoff if they did transfer belatedly. This is impermissible. *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 660 (2d Cir. 1971).

In considering whether company seniority was properly imposed rather than job seniority to govern layoff and recall of employees in IAM jobs, it must be recalled that a district court has wide discretion to fashion relief that will eliminate the vestiges of past discrimination. *United States* v. *United Brotherhood of Carpenters*, 457 F. 2d 210, 216 (7th Cir. 1972); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 721 (7th Cir. 1969). "In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow." *Lemon* v. *Kurtzman*, 411 U. S. 192, 200 (Burger, C. J., plurality). "[P]rincipled application of standards consistent with [the] purposes of [Title VII]" is required, but only a "regime of discretion that 'produce[s] different results from breaches of duty in situations that cannot be differentiated in policy' " (*Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 417) needs to be eschewed. Indeed, in *Franks*

8. Affiliated with certain basic jobs are "premium" higher-paying classifications such as "lead" ramp serviceman and "lead" storekeeper. A premium vacancy is awarded to the bidder with the most seniority in the basic job classification who has the ability to perform the premium job.

9. They are Vallerie McCloud, Willie F. Johnson, David Otero, Richard Melvin Breaux, and Reid Willis.

v. *Bowman Transportation Co.*, 424 U. S. 747, 779 n. 41, the very "holding [was] that in exercising their equitable powers, district courts should take as their starting point the presumption in favor of rightful place seniority relief, and proceed with further legal analysis from that point; and that such relief may not be denied on the abstract basis of adverse impact upon the interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases."

IAM argues that paragraph 1 of Section VII of the decree is unnecesary because seniority adjustments ordered in the decree (paragraphs 3-7 of Section VII) will suffice. However, those adjustments generally occur only if the identifiable employees discriminated against can individually prove that they previously applied, sought to apply, or were dissuaded from applying for the positions in question and were qualified for the job at such time (paragraphs 3, 4(b) and 5 of Section VII.) As the EEOC aptly summarizes: "Females not assigned initially to IAM jobs and minorities who previously did not apply for the higher paying jobs generally will not be entitled to seniority adjustments under the decree" (Br. 26).

The record shows that females have been excluded from mechanic positions since World War II, were excluded from ramp service positions until at least 1971 and were excluded from storekeeper positions (with minuscule exceptions) until 1973. Only women in lesser jobs who had previously applied for or sought transfer to those higher-paying jobs will get seniority adjustments under Section VII of the decree. In view of the discrimination against women then being practiced and the forfeiture of seniority upon transfer, few, if any, would have expressed a desire to transfer, so that they will not receive seniority adjustments despite their having been victims of discrimination. The failure of an individual to apply for a position from which he reasonably could believe that he would

be discriminatorily excluded does not defeat his claim for relief. *International Brotherhood of Teamsters* v. *United States*, 45 L. W. 4506, 4516-4517; *Equal Employment Opportunity Commission* v. *American Telephone and Telegraph Company*, ... F. 2d ..... (3rd Cir. 1977); *Bing* v. *Roadway Express, Inc.*, 485 F. 2d 441, 451 (5th Cir. 1973); *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 660 (2d Cir. 1971); *Hairston* v. *McLean Trucking Co.*, 520 F. 2d 226, 231-232 (4th Cir. 1975). It is true that many minority males applied for higher-paying jobs and thus will get seniority adjustments under Section VII of the decree. However, others would not have futilely applied because of then necessary requirements of high school diplomas and a passing grade on the Otis test (general intelligence) or forfeiture of seniority upon transfer.[10] Thus many males will also not receive adjusted seniority upon transfer.

From the foregoing, it is apparent that many discriminatees will not receive seniority adjustments under paragraphs 3-7 of Section VII of the decree.[11] Because adjusted seniority under the decree does not afford a remedy for all minorities and females, the district court was entitled to select company seniority for layoff and recall as the mechanism to provide redress to those many individuals in the female and minority groups who would not receive adjusted seniority under paragraphs 3-7 of Section VII. It would be unfair to confine the relief to those who can obtain adjusted seniority under the decree, preventing other worthy individuals from getting out of the low-paying jobs to which they were initially and discriminatorily assigned. *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d

10. After the Otis test and the high school diploma requirement were dropped in 1968 for ramp personnel, three times as many minorities were employed in ramp than had been employed in the previous year.

11. Since the entry of the decree, only approximately 18 minorities and 35 non-minorities have had their seniority adjusted by the decree Implementation Committee.

652, 660 (2d Cir. 1971). This minor inroad[12] on the prior collective bargaining system in effect between United and IAM is appropriate to alleviate the severe hardship caused to subjects of discrimination who cannot prove the specific facts necessary for the limited adjusted seniority under the decree. IAM seniority as advocated by the Union would fail to include employees who were discriminatorily assigned to non-IAM positions and thus invidiously deny them the same layoff and recall rights as IAM incumbents for whom total IAM seniority is generally equivalent to company seniority since present IAM members have generally always been in IAM jobs with United. This was explained by Judge Will when overruling IAM's objections to the decree (see excerpts from Judge Will's remarks of April 30, 1976, *supra*).

However, since this case was argued, the Supreme Court's opinion in *International Brotherhood of Teamsters* v. *United States*, 45 L. W. 4506, has been handed down. It is now clear that in order for a non-applicant to receive the traditional presumption that he would have been hired but for his employer's discriminatory conduct, he must demonstrate that he was a potential victim of unlawful discrimination. "Because he is necessarily claiming that he was deterred from applying for his job by the employer's discriminatory practices, his is the not always easy burden of proving that he would have applied for the job had it not been for those practices." *Teamsters, supra*, 45 L. W. at 4517. "Resolution of the nonapplicant's claim * * * requires two distinct determinations: that he would

12. Only seniority with respect to layoff and recall is affected by the decree. Longevity pay, shift assignments and other incidents of seniority are not changed even for the individuals who can receive adjustment under the decree. Thus the Government points out that in some larger sense this is unfair even to those who recieve recall and layoff seniority adjustments since in a "litigated" as opposed to a "consent" decree case they might have received company seniority for all purposes. *Local 189, United Papermakers* v. *United States*, 416 F. 2d 980, 990 (5th Cir. 1969); *United States* v. *Navajo Freight Lines*, 525 F. 2d 1318, 1326-1327 (9th Cir. 1975).

have applied but for discrimination and that he would have been discriminatorily rejected had he applied." *Id.* n. 52.

As to the first prong, we begin with the pre-*Teamsters* law. Although IAM's counsel suggests that this is a case of first impression, our own Circuit has approved company seniority in *Waters* v. *Wisconsin Steel Works*, 502 F. 2d 1309, 1318 (7th Cir. 1974). Similarly, company seniority has been approved elsewhere. *E.g.*, *Hairston* v. *McLean Trucking Co.*, 520 F. 2d 226, 235 (4th Cir. 1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211, 247-249 (5th Cir. 1974); *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 662-665 (2d Cir. 1971), and *Carey* v. *Greyhound Bus Co., Inc.*, 500 F. 2d 1372, 1378 (5th Cir. 1974). The courts have long recognized that the failure of an individual to apply for a position from which he would be discriminatorily excluded does not defeat his claim. While only five employees testified that they were unwilling to transfer to higher paying IAM jobs because they would lose their seniority, that evidence is ample to support the company seniority imposed with respect to layoffs and recalls, especially since IAM admits that non-IAM represented employees had been discriminated against (Br. 31). As Judge Gibbons pointed out in *American Telephone and Telegraph Company, supra,*

> "It will, for example, be nearly impossible to show that individuals were deterred from applying for hiring or promotion, or from attempting to meet the prerequisites for advancement, because of their well-founded belief that a particular employer would not deal fairly with members of their particular sex or racial group" (at slip op. 24).

In any event, Congress did not intend Title VII remedies to be available "only to those knowledgeable enough and militant enough to have demanded and been refused what was not available" (at slip op. 15).

Teamsters has vindicated this point of view as a theoretical matter while emphasizing the difficult proof problems of the

non-applicant. More precisely, *Teamsters'* newly enunciated first principle of Title VII law establishes that to "conclude that a person's failure to submit an application for a job does not inevitably and forever foreclose his entitlement to seniority relief under Title VII is a far cry * * * from holding that non-applicants are always entitled to such relief." *Teamsters*, 45 L. W. at 4517. "The known prospect of discriminatory rejection shows only that employees who wanted * * * jobs may have been deterred from applying for them. It does not show which of the non-applicants actually wanted such jobs, or which possessed the requisite qualifications."[13] *Id.*

Unlike the situation in *Teamsters*, the Government here need not "carry its burden of proof with respect to each specific individual." *Id.* at 4518. This is because the "evidentiary gap" for this group is filled by a given non-applicant's "current willingness to transfer into a * * * position[; it] confirms his past desire for the job."*Id.* In *Teamsters* a "willingness to accept the job security and bidding power afforded by retroactive seniority [for all purposes] says little about what choice an employee would have made had he previously been given the opportunity freely to choose [the job]." *Id.* Here, while a transferee to an IAM job will be given company seniority for purposes of layoff and recall, departmental seniority will continue for other competitive purposes. Thus an "employee who transfers into [an IAM] unit [will be] placed at the bottom of the seniority 'board.' " *Id.* at 4518. Unlike the employees in *Teamsters*, the employees here are not given the option of transferring "on a silver platter." Rather, under the decree, a United employee would have to start from the bottom of the

13. The qualifications for the various jobs is set by Section IV of the decree. Since United, as the employer, has consented to the decree, Section IV provides the definitive answer on job unit qualifications. Cf. *Teamsters, supra,* 45 L. W. at 4517 n. 53.

Since the employer has also consented to company seniority, layoff and recall seniority will not be a question of when a transferee became qualified for a job so long as he is qualified when he applies.

ladder as to all other conditions such as shift assignments, promotions to premium job classifications and longevity pay. Present willingness to start at the bottom of the departmental "board" says much "about what choice an employee would have made had he previously been given the opportunity freely to choose [the job]."[14]

This decree does not abrogate collective bargaining except to impose company seniority with respect to layoff and recall. As the trial judge rightly observed, such relief is necessary to correct inequities that had previously prevailed against the class members, for in the past employees had to forfeit accrued seniority if promoted to IAM jobs. Company seniority was necessarily imposed so that minorities and females in lower-paying jobs would no longer be deterred from seeking promotions to higher-paying IAM jobs. *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 796 (4th Cir. 1971). White male employees will not be unduly hurt since they too receive company seniority under Section VII, paragraph 1.[15] See generally Lopatka, A 1977 Primer on the Federal Regulation of Employment Discrimination, 1977 Ill. L. F. 69, 148-150. As seen, despite the adjustments provided in Section VII, paragraphs 3-7, females and minorities in lower-paying jobs would still be deterred from their movement upward if the prior IAM seniority system were still used with respect to layoffs and recalls. As then

14. Although we find the present willingness to accept unit seniority handicaps, provided only that layoff and recall seniority is measured on a company basis, to be compelling on the past desire to apply, we should also note that the low-paying job groups to which the minorities and women were disproportionately assigned are not "parallel" to the jobs from which they were excluded. *Teamsters, supra,* 45 L. W. at 4518 n. 55.

15. On appeal, IAM raises for the first time the theory that everyone laid off under company seniority who would have remained on the job if job classification seniority were used should be recompensed for lost work. Since this argument is non-jurisdictional, it may not be raised now. *United States* v. *Tyrrell,* 329 F. 2d 341, 345 (7th Cir. 1964).

Chief Judge Swygert pointed out in *Waters* v. *Wisconsin Steel Works, supra,* 502 F. 2d at 1320:

> "Moreover, an employment seniority system is properly distinguished from job or department seniority systems for purposes of Title VII. Under the latter, continuing restrictions on transfer and promotion create unearned or artificial expectations of preference in favor of white workers when compared with black incumbents having an equal or greater length of service. Under the employment seniority system there is equal recognition of employment seniority which preserves only the earned expectations of long-service employees."[16]

While IAM insists this relief illegally destroys collective bargaining rights, it is well settled that seniority systems in collective bargaining agreements may be modified to provide relief under Title VII. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 778-779; *Equal Employment Opportunity Commission* v. *American Telephone and Telegraph Company, supra,* slip op. 21-22; *United States* v. *International Union of Elevator Constructors,* 538 F. 2d 1012 (3d Cir. 1976). However, *Teamsters* now requires that discrimination imposed after the effective date of the Civil Rights Act of 1964 cannot engender a remedy which grants retroactive seniority which antedates the Act. If a seniority system "did not have its genesis in racial discrimination * * * [and] was negotiated and has been maintained free from any illegal purpose," those "employees who suffered only pre-Act discrimination are not entitled to relief, and no person may be given retroactive seniority to a date earlier than the effective date of the Act." 45 L. W. 4514. The seniority system here is

16. *Teamsters* notes that "there is no reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plant-wide seniority systems." 45 L. W. at 4514, n. 41. However, once *Franks* direct remedy relief is indicated, 45 L. W. at 4512, Judge Swygert's language in *Waters* provides guidance on the location of the proper boundaries of the equitable relief. These words continue to legitimate the thrust of the decree below.

neutral on its face and Judge Will did not find a taint in its genesis or maintenance. Thus the teaching of *Teamsters* is directly applicable.

Since employees who suffered only pre-Act discrimination may not have their seniority adjusted pre-Act, company seniority as used in the decree will henceforth mean either total tenure with the company after July 2, 1965 (the effective date of the Civil Rights Act of 1964), or total union seniority whichever is greater. *Teamsters* establishes "the legality of the seniority system insofar as it perpetuates post-Act discrimination" because "Section 703(h) on its face immunizes all bona fide seniority systems, and does not distinguish between the perpetuation of pre-Act and post-Act discrimination." 45 L. W. at 4512 n. 30. A casual reading of this footnote in *Teamsters* might suggest that company seniority could not extend even to persons who have suffered post-Act discrimination. However, the footnote must be understood in conjunction with the textual passage it supplements, namely, the following:

> "Post-Act discriminatees, however, may obtain full 'make whole' relief, including retroactive seniority under *Franks* v. *Bowman*, *supra*, without attacking the legality of the seniority system as applied to them. *Franks* made clear * * * that retroactive seniority may be awarded as relief from an employer's discriminatory hiring and assignment policies even if the seniority system agreement itself makes no provision for such relief. 424 U.S. at 778-779. Here the Government has proved that the company engaged in a post-Act pattern of discriminatory hiring, assignment, transfer, and promotion policies. Any [minority or woman] * * * injured by those policies may receive all appropriate relief as direct remedy for this discrimination."

Id. at 4512.

For individuals who can demonstrate under Section VII, paragraphs 3-7 of the decree that they previously applied, sought to apply, or were dissuaded from applying, the language

of footnote 30 is plainly inapplicable. For this group, seniority may be computed as time with the company rather than with the union job unit so long as the seniority adjustment does not antedate the Act.

However, those employees who now transfer because post-Act discrimination dissuaded them from transferring to a certain IAM job unit in the past pose a more difficult problem. The effect of footnote 30 on them is to permit company seniority if they apply for a transfer but not if they choose to remain in their present jobs. In this case, bargaining unit seniority still controls for all competitive purposes except layoff and recall. Cf. *Teamsters*, 45 L. W. 4511. As we have demonstrated above, employees who choose to transfer now and start at the bottom of the job unit board for competitive purposes have overleapt the evidentiary gap necessary for a "direct remedy" under *Franks*. But if an employee does not choose to transfer, no evidentiary presumption is available to put him on the same basis as individuals who can explicitly prove prior application and discriminatory refusal. For them any seniority adjustment in their layoff and recall rights would be a remedy for the discriminatory effects passively engendered by the bona fide seniority system. *Teamsters* forecloses this type of relief.[17]

As to the second prong of the *Teamsters* test, IAM claims the decree is overbroad because class members who were never actually held back by discrimination theoretically may transfer

17. Thus a class member who transferred to an IAM position prior to the decree but not pre-Act would have to be content with union seniority since their relatively low layoff and recall seniority is caused by the passive operation of a bona fide seniority system which is perpetuating pre- and post-Act discrimination. However, because a new transferee starts with no departmental seniority, the previous transferee will always have superior departmental seniority even though his layoff seniority would be governed by his union time. Further, it would be possible that a previously transferred employee could be laid off first even though his time with the company is longer than the subsequent transferee under the decree since the previous transferee has shorter union security than the subsequent transferee's company seniority.

from a non-IAM position to an IAM position in order to obtain seniority for purposes of layoff.[18] These fears are highly speculative; indeed they border on the preposterous. Cf. *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 45 L. W. 4524. It is difficult to comprehend why someone who was never held back by discrimination would now take an IAM position merely to have company seniority for layoff and recall in the new position when he would have to start from the bottom of the ladder as to all other conditions such as shift assignments, promotions to premium job classifications and longevity pay.

Moreover, the adjusted seniority system in the decree does not arbitrarily oust "insiders" in favor of "outsiders" who were not actually subject to discrimination. See *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 776-778; *Patterson* v. *American Tobacco Co.*, 535 F. 2d 257 (4th Cir. 1976). Rather one employee will be competing against another only on the basis of his earned expectations based on company service. Company seniority assures that incumbent employees will be protected from layoff on a fair basis. Speculative counter examples, such as IAM suggests, of a few non-class members benefiting from the decree are immaterial. See *United States* v. *Navajo Freight Lines*, 525 F. 2d 1318, 1327 (9th Cir. 1975). Company seniority is a common denominator which treats all employees fairly regardless of past discrimination.

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18. IAM poses the hypothetical of a supervisor with long company service who after working as a mechanic for one day will be able to protect himself against layoff on the basis of company seniority ahead of a black employee who has been a mechanic for a number of years but who has less company seniority.

The second sentence of Section VII, paragraph 1, provides an exception from company layoff and recall seniority with respect to promoted employees, including supervisors, as that term is used in the IAM agreement. Such promoted employees have only time spent in non-management jobs as their seniority for layoff, so that IAM wrongfully asserts that a former supervisor after working one day as a mechanic would have a preference over a black mechanic (Br. 19).

In the circumstances of this case, the district judge was warranted in using company seniority with respect to layoffs and recalls rather than IAM seniority for employees who wish to transfer between jobs. Therefore, the decree is affirmed as modified. Any forthcoming proceedings below must of course be consistent herewith.[19]

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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19. In Section XIII of the decree Judge Will retained jurisdiction "for the purpose of issuing any additional orders or decrees needed to effectuate, clarify or enforce the full purposes and intent hereof." Therefore, the parties already have a forum with respect to *Teamsters'* "bearing on particular aspects of the complicated scheme of relief awarded in this case." The June 20, 1977, motion of appellees for a remand is accordingly denied.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 28, 1977

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,
Plaintiffs-Appellees,

No. 76-1769 *vs.*

UNITED AIR LINES, INC., et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 73 C 972

Hubert L. Will, Judge.

ORDER

On consideration of the Petition of appellant International Association of Machinists to vacate and remand, the panel supplements the close of its opinion of June 28, 1977, as follows:

> *International Brotherhood of Teamsters* v. *United States*, 45 LW 4506, is an extraordinary case from the standpoint of *stare decisis*. In the words of Justice Marshall's dissent:
>
> > "As the Court also concedes, with a touch of understatement, 'the view that § 703(h) does not immunize seniority systems that perpetuate the effects of prior discrimination has much support.' *Ante*, at ....., n. 28. Without a single dissent, six courts of appeals have so held in over 30 cases, and two other courts of appeals have indicated their agreement, also without dissent. In an unbroken line of cases, the EEOC has reached the same conclusion. And the overwhelming weight of scholarly opinion is in accord." *Id.* at 4520.

Our view of *Teamsters*' effect on the decree below may create a remedy which is alien to the purposes and intent of the consenting parties. Otherwise the original decree, along with supplemental effectuating decrees, will suffice to fine-tune the remedy to conform to *Teamsters* and our opinion. But if the anomalies created by applying *Teamsters* to the factual predicate below fundamentally impair the vindication of the Title VII violation, Section XIII of the decree (see n. 19 of our opinion) empowers Judge Will to enter decrees which actually supersede his present decree.

The parties' mistake of law here is *sui generis*. When the Supreme Court hands down an opinion contrary to the universal holdings of a plethora of cases of the courts of appeals and the unbroken voices of the commentators, its decision still discloses the controlling law. But in such a unique case, the prior mistaken view of the law is more akin to a mistake of fact. In such a situation, the district court is free to fashion another remedy so long as that remedy is consistent both with *Teamsters* generally and with the gloss our opinion puts on the Supreme Court's opinion.

On consideration of the appellant's alternate petition for rehearing and suggestion for rehearing *en banc*, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS FURTHER ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* * * * *

DECREE OF THE DISTRICT COURT OF APRIL 30, 1976
(Seniority Provisions)

VII. SENIORITY

1. All job classifications covered by the United-IAM Ramp and Stores, Food Services, Mechanic, Dispatchers and Guards Agreements, as well as those jobs covered by United's agreements with TWU and ALEA, shall henceforth be governed by company seniority for purposes of determining priorities in layoffs and recalls. Employees in promoted positions holding seniority under the Mechanic, Ramp and Stores, Food Services, Dispatcher and Guards Agreements or thereafter promoted to such positions shall, upon return to a position under one of the Agreements in which he holds seniority, be credited for the purposes of layoffs and recalls with a company seniority date equivalent to the seniority they held while in the promoted position pursuant to the seniority provisions of the collective bargaining agreements.

2. An employee in a job classification covered by the IAM-United Mechanic, Ramp Service, Food Service and Guard collective bargaining agreements or an assistant flight dispatcher who is laid off in his classification at a point shall have the choice of exercising company seniority in that classification pursuant to the Seniority Article of such collective bargaining agreements or take layoff. If he has been in his present classification 2 years or more and if he does not have sufficient company seniority to fill a vacancy or displace an employee in his present classification on the system, then he can exercise his company seniority to any classification in which he has worked in the same manner as those employees who have been in their classification less than two years as now provided in the Seniority Article of such collective bargaining agreements. In the event an employee exercises his seniority to return to a lower-rated classification, he must return to the highest lower-rated classification in which he holds seniority or forfeit all seniority held in that or any other classification higher than the classification to which he returns.

3. United and the Commission shall determine within 45 days from the entry of the decree which employees in the Ramp Service and Storekeeper classification who transferred prior to January 1, 1970 into such positions from a Group III IAM Classification as defined in the Retirement Plan under the presently effective United-IAM Ramp and Stores Agreement, or from skycap, shall receive a seniority adjustment in his present job classification seniority. Such determinations shall be made on a case by case basis after a review of personnel files. To obtain such adjustment, it must be shown that the individual had previously applied for or sought transfer to the position of ramp service or storekeeper and had not been hired or transferred in whole or in part because of a test score or educational requirement. In the absence of applicable records, determinations shall be made on the basis of the best available data.

4. The Implementation Committee shall have authority to make seniority adjustments on a case by case basis, where individual fact situations make adjustment appropriate, for the following groups:

(a) Incumbent minority employees hired into Group III IAM classifications on or before December 31, 1968 who have transferred to ramp service or stores subsequent to January 1, 1970 or who subsequently transfer to ramp service or stores as a result of a transfer request filed on or before December 31, 1976;

(b) Incumbent female employees in Group III IAM classifications, Job Groups 16-17, or clerical positions below Job Group 7, who have transferred to ramp service or stores or who transfer into such position pursuant to a transfer request filed on or before December 31, 1976.

To obtain such adjustment, such employees must show that they were previously qualified for such positions and previously applied for, sought transfer to or were dissuaded from applying for such positions.

5. The Implementation Committee shall have authority to make seniority adjustments on a case by case basis, where individual fact situations make adjustment appropriate, for incumbent black and SSA employees hired prior to January 1, 1972 who have transferred to or do transfer to flight attendant on or before December 31, 1976 as a result of a transfer request filed on or before December 31, 1975. To obtain such adjustment, such employees must show that they were previously qualified for the flight attendant position and previously applied for, sought transfer to or were dissuaded from applying for such position. In granting adjustments in seniority, the Implementation Committee shall have authority to establish residency requirements in flight attendant positions.

6. In addition to the seniority adjustments set forth above, adjustments will be made for identified individuals as set forth in Appendix 6. United and the Commission shall determine within 45 days of the entry of this Decree which minority mechanics or applicants for mechanic, presently unidentified, shall be added to Appendix 6.

7. (a) Notwithstanding any other provision in this Decree, all persons permanently classified as seamers as of December 1, 1975, who file transfer requests for mechanic positions by December 31, 1976, shall have a single right of first refusal for mechanic vacancies arising in the Cabin Equipment Shops (SFOCE 8740), subject only to the priority rights of incumbent mechanics at the point to bid into these shops pursuant to the United-IAM Mechanic Collective Bargaining Agreement. Such seamer transfer requests will be deemed active until a seamer has had the opportunity to exercise the right of first refusal. Among seamers who have mechanic transfer requests on file contemporaneously, the right of first refusal shall be administered in order of seniority in the seamer classification.

(b) Nothing herein shall preclude transfer of seamers to mechanic jobs outside the cabin equipment shops. However, seamers who successfully complete probation in such other shops

will no longer be eligible to exercise a right of first refusal pursuant to subparagraph (a) above.

(c) All seamers who transfer to mechanic shall be accorded, in the mechanic classification, a seniority date equal to their company seniority date.

(d) Seamers who transfer to mechanic shall continue to accrue seniority as seamers throughout their mechanic probationary period. In the event any such person either elects to leave the mechanic position during probation or is unable successfully to complete the mechanic probationary period, she shall be afforded the opportunity to return to the seamer classification without loss of any seniority.

8. The changes in seniority accomplished pursuant to paragraphs 1 through 7 above shall be applied only to those events governed by seniority occurring after the effective date of this Decree.

9. In order to receive the individual seniority adjustments provided for in paragraph 4-7 above, an employee shall be required to execute a release in accordance with Section XI, paragraph 5.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,
vs.
UNITED AIR LINES, et al.,
Defendants.

Civil Action
No. 73 C 972

ORDER AMENDING DECREE.

This cause coming on to be heard upon the motion of Plaintiff Equal Employment Opportunity Commission and Defendant United Air Lines, Inc. to modify the Decree entered by this Court on April 30, 1976 and the Court having considered the grounds for the motion:

IT IS HEREBY ORDERED, that paragraph 1 of Section VII of the Decree entered on April 30, 1976 shall be amended to read as follows:

1. All job classifications covered by the United IAM Ramp and Stores, Food Services, Mechanic, Dispatchers, Communications employees and Guards Agreements as well as those jobs covered by United's agreements with TWU and ALEA shall henceforth be governed by the following seniority for purposes of determining priorities in layoffs and recalls:

a. Classification seniority for all employees who entered the job classification in question prior to July 1, 1965.

b. A seniority date of July 1, 1965 for all employees who were initially hired by United prior to

July 1, 1965 but did not enter the job classification in question until after July 1, 1965.

c. Company seniority for all employees who were initially hired by United after July 1, 1965 and did not enter the job classification until after that date.

d. Employees in promoted positions holding seniority under the Mechanic, Ramp and Stores, Food Services, Dispatchers and Guards Agreements or are thereafter promoted to such positions shall, upon return to a position under one of the Agreements in which he holds seniority, be credited for purposes of layoffs and recalls with a seniority date equivalent to the seniority they held while in the promoted position pursuant to the seniority provisions of the collective bargaining agreement.

Ordered this 29 day of September, 1977.

HUBERT L. WILL,
United States District Judge.